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IN THE

Supreme Court of the United States

October Term, 1944.

A. M. ANDERSON, Receiver National Bank of Kentucky, - - - - - - - - Petitioner,

versus

R. C. TWAY, - - - - - - - - Respondent.

RESPONSE OF R. C. TWAY, RESPONDENT, TO PETITION FOR WRIT OF CERTIORARI AND TO BRIEF IN SUPPORT OF SUCH PETITION.

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WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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IN THE

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A. M. ANDERSON, RECEIVER NATIONAL BANK OF KENTUCKY, - - - - - - - *Petitioner,*

v.

R. C. TWAY, - - - - - - - - *Respondent.*

RESPONSE OF R. C. TWAY, RESPONDENT, TO PETITION FOR WRIT OF CERTIORARI AND TO BRIEF IN SUPPORT OF SUCH PETITION.

GROUNDS ON WHICH PETITIONER SEEKS CERTIORARI.

The petition is bottomed upon the claim that certain rulings of the trial court, sanctioned by the Circuit Court of Appeals, constituted such a departure from the accepted and usual course of federal judicial procedure as to demand review by this Court.

The rulings complained of in the petition are:

(1) The admission in evidence of certain reports of examinations of the National Bank of Kentucky made by national bank examiners.

(2) The admission in evidence of certain parts of a bill in equity filed by the Receiver against the bank's directors.

(3) The admission in evidence of a table of earnings of the bank prepared by an accountant employed by the Receiver.

(4) Refusal to grant a new trial on alleged newly discovered evidence.

(5) Refusal to submit to the jury the Receiver's defense of *ultra vires.*

(6) Refusal of the trial court to hold that Tway could not plead the fraud practiced upon him as a complete defense to the note, but that in this action his only remedy was to assert the fraud in a counterclaim offsetting his liability on the note by the amount of damages, if any, the jury might find for him on the counterclaim.

We assume that the Court will not grant the Writ unless it appears reasonably probable that the case presents some substantial and important questions of law not heretofore passed upon by this Court; and that in the determination of whether such questions are presented, the Court will examine not only the petition, but the response thereto as well. On that assumption, we shall attempt to demonstrate not only that there are no such questions in this record, but that the petition is not even characterized by that candor and sincerity which should characterize such an application.

Before proceeding to a discussion of the six grounds relied upon by petitioner, a short preliminary statement of facts is deemed necessary.

PRELIMINARY STATEMENT.

The Receiver of the National Bank of Kentucky sued Tway to recover judgment on his promissory note executed to the bank about a year before the failure of that institution. Tway's defense was that in the prosecution of its campaign to sell and distribute the capital stock of BancoKentucky Company, a corporation which the bank caused to be organized and promoted and in the success of which it was vitally interested, the bank, by positive misrepresentations and by the concealment of and failure to disclose material facts, induced him to purchase Banco stock and execute and deliver the original of the note sued on for the amount of the purchase price of the stock, which amount the bank, as an inducement to Tway to make the purchase, agreed to lend him on the sole security of the stock.

The story of the organization of BancoKentucky Company, and of the activities of the National Bank of Kentucky in connection therewith, was before this Court in the case of *Anderson, Receiver* v. *Abbott,* 321 U. S. 349, in which case the Court, in speaking of the organization of Banco, said:

> "It was organized by the management of the National Bank of Kentucky and of Louisville Trust Company—banking houses doing business at Louisville. Banco perfected the desired alliance between them by acquiring most of their shares in exchange for its shares. The bank, the trust company, and Banco each had the same directors and certain common officers."

As this Court doubtless learned from the record in that case, and as is fully disclosed by the record in the case at bar (R. 8, 9, 235, 769), Banco had an authorized capital of 2,000,000 shares of the par value of $10 per share. Under the plan promoted by the bank, that stock was marketed at $25 per share, the purpose being to give the company a capital of $20,000,000 and a surplus of $30,000,000. The plan under which Banco stock was exchanged for the stock of the National Bank of Kentucky assigned to the stock of the latter a value of $500 per share, and at the date Tway executed the original of the note sued on, October 1, 1929, $18,914,500 of the authorized capital and surplus of Banco was represented by National Bank of Kentucky stock exchanged at the price of $500 per share. This sum represented 95% of Banco's authorized capital of $20,000,000 and 38% of its combined capital and surplus of $50,000,000. Of course, in this situation the actual condition of the National Bank of Kentucky and the true value of its stock were vitally material elements in determining the value of Banco stock.

Prior to its receivership, the National Bank of Kentucky, by published financial statements which had been furnished to and read by Tway, represented that it had an unimpaired capital of $4,000,000, a surplus of $2,000,000 and undivided profits of $234,635.05 (R. 194, 195). It was regarded by the public, including Tway, as one of the strongest financial institutions of the South (R. 145, 147, 150, 151, 904, 907).

As a matter of fact, however, at the time Banco was organized and when the bank sold Tway the stock, that

institution was in a critical and failing financial condition. Indeed, its condition was a matter of such grave concern to the Comptroller of the Currency and his examiners that from 1927 until the failure of the bank in 1930, they almost constantly were urging the bank to get its financial house in order. Finally the demands of the Comptroller became so insistent that the officers of the bank, during the examination by the national bank examiners in May and June, 1929, just one month before the organization of Banco, induced the examiners to postpone their demand for a heavy charge off of slow and worthless loans by the assurance that it was proposed to organize a large holding company which would use its assets to take some of the criticized items out of the bank's portfolio, and by the further assurance that the bank intended to denationalize by surrendering its national charter and taking out a state charter, thus relieving the Comptroller of further responsibility for the financial integrity of the institution. In line with those assurances, the Board of Directors of the bank by two resolutions of June 7, 1929, and of June 21, 1929 (R. 501), authorized the organization of a corporation which turned out to be Banco, and on September 27, 1929 (R. 508), authorized the incorporation of the bank as a state institution, and thereafter procured a charter as such institution (R. 513, 514). It thereupon applied for membership in the Federal Reserve System as a state bank (R. 515) and upon the requirement of the Federal Reserve agent at St. Louis that the bank must submit to an examination before being admitted as a member of the System (R.

520), and must eliminate from its assets over $4,000,000 of its assets criticized in the May-June, 1929, examination, the bank abandoned its plan of denationalization and surrendered its state charter.

Tway executed three renewals of the original note, the last renewal being the one sued on, dated October 2, 1930, and at the time of each renewal he paid the interest to the date of the maturity thereof, the interest so paid aggregating in round figures $3,000 (R. 106, 107). Four quarterly dividends of $400 each were paid on the 2,000 shares of Banco stock, same being paid respectively in January, April, July and October, 1930 (R. 113). These dividends were all turned over to R. C. Tway Coal Sales Company, the real owner of the stock, and that company reported same in its 1930 Income Tax Return (R. 1295).

On February 2, 1931, the date of the maturity of the last renewal and after receivership, the Receiver, at the request of Tway, applied as credits on the note $4,031.74 of deposits, of which Tway was the owner, and at the same time Tway paid the Receiver the additional sum of $1,993.26, which resulted in paying interest on the renewal from October 2, 1930, to February 2, 1931, and in reducing the principal by the sum of $5,000. Thereafter on July 13, 1931, and on October 8, 1931, Tway made interest payments on the note to the Receiver aggregating $1,800. The total amount of interest and principal payments made by Tway on the note, including interest payments prior to receivership, was $10,883.33 (R. 107).

In the early part of 1931, the Receiver filed an action against the directors of the bank to enforce

individual liability against them for losses to the bank from mismanagement, and during October, November and December, 1931, the Receiver took a vast amount of proof in his action against the Directors, to establish the failing condition of the bank in 1927, 1928 and 1929 (R. 448, 449), and this evidence which included the reports of the bank's examinations during those years, unmistakably disclosed that the bank was in a precarious financial condition at the time it sold Tway the 2,000 shares of Banco stock. Tway first learned of the substance of this evidence in January or February, 1932, when informed thereof by his attorney (R. 240, 444, 445).

We shall discuss the six grounds upon which petitioner relies in his petition in the order heretofore stated.

1.

The Admission in Evidence of the National Bank Examiners' Reports.

Petitioner makes two contentions in respect to these reports: (a) that they were not admissible for any purpose as the examiners who made the reports were not produced as witnesses to vouch for their correctness and were not available for cross-examination; and (b) that much of the material in each of the reports is based upon the examiner's interrogation of, and reports to him from, the bank's officers, rather than upon the result of the examiner's own knowledge and observation, with the claimed result that the admission of the reports violated the rule against hearsay evidence.

Petitioner evidently realizes that this Court would hesitate to grant certiorari merely because of the admission of hearsay testimony, and therefore relies chiefly upon the claim that the admission of the reports as evidence illegally deprived him of his right of cross-examination and, hence, denied him due process.

The petition is silent on certain very material facts in respect of the admission of the examiners' reports. Those facts are:

(a^1) The authenticity of the reports was admitted.

(b^1) A copy of each of the reports was filed with the bank at the time same was made and was a part of the records of the bank at the time the Receiver took possession thereof, and he has had possession of them ever since.

(c^1) The Receiver had been in possession, not only of those reports, but of all the other records of the bank for approximately ten years at the time this action was tried, and had the assistance not only of a large force of employees, but of an independent firm of accountants, Lybrand, Ross Brothers and Montgomery, to ascertain the true condition of the bank (R. 659); and in all of the suits which have grown out of the failure of the bank, he has never challenged the correctness of the examiners' reports, but, on the contrary, they have been his chief reliance in his efforts to prove that the bank was in a failing condition for three years immediately prior to its failure.

(d^1) Each of the reports was introduced by the Receiver as evidence of the condition of the bank, and of the criticisms by the bank examiners and the Comp-

troller's office and of the other facts therein dealt with, in another action by this same Receiver against the respondent, Tway, and others, which action ultimately came before, and was decided by, this Court under the style of *Anderson, Receiver,* v. *Abbott, et al.,* 321 U. S. 349. The record in that case, including the same bank examiners' reports, on motion of the Receiver, was filed as an exhibit in this case (R. 1093, 1094). While the schedule in the case at bar called for the inclusion of the record in *Anderson, Receiver,* v. *Abbott,* we do not know whether it was included or not. At any rate, the record of that case is in this Court and the evidence covering the introduction of the reports is found in Vol. 2 of the Transcript of Evidence in that case, pages 140 to 182, both inclusive.

(e[1]) In *Anderson, Receiver,* v. *Abbott, et al., supra,* the Receiver used as witnesses to prove the correctness of the reports exactly the same witnesses he now insists Tway should have produced so as to afford him an opportunity, by cross-examination, to impeach those same reports—namely, the examiners who made the reports.

We submit that the foregoing facts fully justify the statement made near the beginning of this response that the petition is lacking in candor.

On the merits of the question, we believe the reports were properly admitted for two reasons: (first) having been introduced and vouched for by the Receiver in the other suit against Tway, they were competent in the case at bar as admissions against interest on the part of the Receiver; and (second), being of-

ficial records and reports required by law to be made, they were admissible as evidence of the facts therein stated.

(First) In the *Abbott* case, by offering the reports to prove the condition of the bank, the Receiver, in effect, asserted that they did correctly disclose its condition. Under a well settled principle of law, what he asserted as a fact in that case is competent as an admission in the case at bar. *Wigmore on Evidence,* Vol. 4, page 97, §1073, states the applicable rule:

> "The party's use of a document made by a third person will frequently amount to an approval of its statements as correct, and thus it may be received against him as an admission by adoption."

This rule is especially applicable where the prior use was against the party offering it as an admission by adoption in the later case. See also *People* v. *Burgess,* 244 N. Y. 472, 155 N. E. 745.

Not only did the Receiver introduce the examiners' reports in the *Abbott* case as evidence of the condition of the bank, he did exactly the same thing in the suit against the directors of the bank and was successful in having the Court accept those reports as evidence of its condition. In *Atherton* v. *Anderson,* 99 Fed. 2d 883, 889, the Circuit Court of Appeals for the Sixth Circuit used this language in respect of what those same reports disclosed:

> "National Bank Examiners made an examination semi-annually and forwarded their reports to the Comptroller of the Treasury, leaving a copy with the Bank. The record is replete with copies

of letters from the Comptroller's Office from 1919 until the close of the Bank concerning these reports. Some of these letters were addressed directly to the Board, others to the President, and others to various officers of the Bank. It is not practical here to go into detail touching the contents of either the letters or the reports. It is enough to say that the reports exhibited the ruinous condition of the Bank in general and of the Wagon Company account in particular and the Examiner's reports invariably criticized the handling of it and especially the excessive overdrafts."

The examiners' reports introduced by Tway in the case at bar were of examinations made on the following dates: April 23 to May 12, 1927; October 14 to October 29, 1927; March 9 to March 31, 1928; October 13 to October 27, 1928; May 25 to June 15, 1929; December 30, 1929 to January 11, 1930; April 26 to May 9, 1930; and September 17, 1930. In the *Abbott* record they are identified as plaintiff's Exhibits 13, 14, 15, 16, 17, 18 and 19, respectively.

The same counsel represented the Receiver in the *Abbott* case as represent him in this proceeding, and the utter lack of sincerity in the complaint that the petitioner was afforded no opportunity to show the unreliability of the examiners' reports through cross-examination of the examiners who made same, is probably best demonstrated by a consideration of their brief filed in this Court in the *Abbott* case. Pages 7 to 24 of that brief are devoted almost exclusively to a discussion of the condition of the bank at the time Banco was organized, as disclosed by the examiners'

reports beginning with the report of the examination of April-May, 1927, and ending with the examination of May-June, 1929, and by the correspondence between the Comptroller and the bank and its officials in respect of those reports. Those reports are the same ones introduced in Tway's behalf in the case at bar. That part of the brief opens with the following statement:

"FACTS OF THE CASE

"National Bank of Kentucky was in an unhealthy condition for three full years before it failed on November 16, 1930. Its financial condition grew worse gradually and was very bad in June, 1929, when BancoKentucky was organized, and even worse in October, 1929, when the bank shareholders exchanged their bank stock for BancoKentucky stock. It failed, and so did Banco, exactly thirteen months and sixteen days after the exchange was made.

"The above general statement is not argumentative. *It is supported by actual and uncontradicted written records of the National Bank of Kentucky introduced in evidence in this case and appearing in great detail in the record before this Court.*" (Brief, page 7.) (Emphasis ours.)

The brief then proceeds to discuss the condition of the bank as of the date of each of the examinations as disclosed by the report thereof. The discussion of each report is under a numbered heading which briefly summarizes the bank's condition as disclosed by that particular report. Those headings and excerpts from the discussion under each are interesting:

"1. National Bank of Kentucky's Financial Condition Unhealthy on April 23, 1927.

"National Bank of Kentucky was examined by the National Bank Examiners on April 23, 1927, which was more than three years before the failure. The examination was concluded on May 12, 1927. The Examiners' report was lodged with the Comptroller of the Currency. A copy of the report, as is customary, was promptly sent to the Board of Directors of the bank. * * *" (Brief, page 7).

"In spite of this unhealthy condition, or better perhaps because of it, National Bank of Kentucky, right at this time, went into a sort of partnership with Louisville Trust Company, a large state bank. Louisville Trust Company failed the same day National Bank of Kentucky failed, so it was a case of two weak brothers leaning on each other for support. * * *" (Brief, page 10).

"2. No Improvement in Its Condition During Next Six Months.

"The Bank Examiner's report of October 14, 1927 (Ex. V. 1, pp. 315 to 406), shows that the unhealthy condition existing six months previous (see pp. 7 to 10, *infra*) had not improved, notwithstanding 'unification' with Louisville Trust Company and the publicity attending the same. It requires substance to clean up a failing national bank. * * *" (Brief, page 11).

"3. National Bank of Kentucky's Condition at March 9, 1928, Shows That It Was Getting Worse.

"The Bank Examiner's report of the bank examination of March 9, 1928, showed a further decline in its financial position (Ex. V, 1, pp. 408 to 485). * * *" (Brief, page 14.)

"4. Bank's Condition Was Very Bad at October 13, 1928.

"A regular national bank examination was again held on October 13, 1928 (Ex. V. 2, pp. 486 to 571). This date is a little more than six months before BancoKentucky was organized and just about a year before the exchange of bank stock for Banco stock. * * *" (Brief, page 16).

"5. When BancoKentucky Was Promoted and Organized, National Bank of Kentucky Was in a Precarious Condition.

"A regular examination of the National Bank of Kentucky began on May 25, 1929, and consumed twenty-two days. This examination was conducted by the Chief National Bank Examiner (Ex. V. 2, pp. 572 to 652). During this examination the Chief Examiner discussed at length with the President and other officers the unsatisfactory condition of the bank (Ex. V. 2, p. 650). As a result of these conferences it was promised to the Examiner that a holding company would be formed, with new capital, and that the criticized assets would be taken out of the bank.

"National Bank of Kentucky at this time was in a deplorable condition, as its own records plainly show. Its condition at that time might well be said to be desperate. * * *" (Brief, page 18).

After quoting from the report a criticism of the Kentucky Wagon Manufacturing Company's loan, the brief continues:

"* * * The Bank Examiner discussed this and all other criticized assets with the officers of the bank. To save the situation the bank officials told the Examiner that, if he would waive the required and necessary charge-offs at this examination, a great holding company with new capital would be immediately organized to take Kentucky Wagon and all the other dead wood out of the bank. It is all in writing in the National Bank Examiner's May 25, 1929, report wherein it is stated:

"'Your examiner feels that the realizable value of this asset is so uncertain that the management of the bank should continue to make some substantial charges to Profit and Loss on account of it. The matter was discussed at some length at an officers' meeting. Your examiner was advised that a plan is in contemplation whereby a sort of a finance and holding company will be organized with a large capital stock, say twenty million dollars.

"'The holding company will hold, among other things, the stock of the National Bank of Kentucky and its affiliated bank through a surrender and exchange of stock of the bank for stock of the company on some satisfactory basis. It is also contemplated that the holding company

will acquire, and through a term of years work out, certain assets of the bank, among others, probably Kentucky Wagon Manufacturing Company. In view of the contemplated organization of the holding company, your examiner was requested to waive any charge to Profit and Loss at this time on account of the Kentucky Wagon Manufacturing Company loan. Your examiner suggested that the matter might be deferred until the next examination, provided the management of the bank would agree that if the Kentucky Wagon Manufacturing Company loan is not removed from the bank by the time of the next examination, a charge of $200,000.00 to Profit and Loss would be made on the loan. It later developed that the proposed plan of consolidation is likely to be consummated at an early date, hence the matter of charge off was dropped' (Ex. V. 2, p. 612).

"As to losses generally, the report states:

" 'The matter was discussed in meeting of officers. It was also discussed in a conference with President Brown. It is expected that the bank will be functioning as a State institution within ninety days. In view of this fact, the management requested that the matter of "charging off" losses be waived' (Ex. V. 2, p. 650).

"The examination was concluded June 15, 1929." (Brief, pages 21 and 22.)

Under each of the five headings above quoted the brief contains a more or less detailed recitation of the

contents of the particular report under discussion as to criticized assets and practices and the bank's condition generally, which fully justify the summary statement of its condition contained in each of such headings.

Probably the references to the exhibits contained in the quotations from the brief need an explanation. The references do not coincide with the exhibit numbers nor the pages of the record in the *Abbott* case. When that case was appealed, counsel for the Receiver had photostats of the exhibits bound into five volumes for the convenience of the Court, and the references in the above quotations are to those volumes of exhibits rather than to the certified record on appeal.

We respectfully submit that, having used the examiners' reports against Tway in the *Abbott* case, the Receiver may not object to their use by Tway for the purpose of proving the same facts the Receiver used them to prove in the *Abbott* case. Unquestionably, they were competent against the Receiver as admissions by adoption.

(Second) If for any reason it should be held that the reports were not competent as admissions by adoption, nevertheless, inasmuch as they were official records and reports required by law to be made, they were admissible without further proof as evidence of the facts therein stated and dealt with.

In the lower court the Receiver sought to avoid the admissibility of the reports as official reports and records by asserting that national banks are purely private institutions. Of course, this is not true. National

banks are institutions and instrumentalities of the National Government (Section 21, Title 12, U. S. C. A.). Their powers are carefully enumerated and limited; they have been granted the extraordinary power of issuing their notes, which are permitted to circulate as money (Section 109, Title 12, U. S. C. A.); and the Secretary of the Treasury is empowered to authorize them to act as depositories and fiscal agents of the Government (Section 90, Title 12, U. S. C. A.). They are subject twice each year, and oftener, if the Comptroller of the Currency so determines, to examination by national bank examiners appointed by the Comptroller. The powers and duties of national bank examiners in conducting such examinations are defined by statute as follows:

> "The examiner making the examination of any national bank, or of any other member bank, shall have power to make a thorough examination of all the affairs of the bank and in doing so he shall have power to administer oaths and to examine any of the officers and agents thereof under oath and shall make a full and detailed report of the condition of said bank to the Comptroller of the Currency." (Sec. 481, Title 12, U. S. C. A.)

According to regular practice and under regulations of the Treasury Department, copy of each report is filed with the bank under examination. Because of the fact that they are agencies of the United States Government and not private institutions, they are exempt from taxation in the states in which they conduct

their business except to the extent specifically authorized by Congress. *McCulloch* v. *Maryland,* 4 Wheat. 316; *New York ex rel. Williams* v. *Weaver,* 100 U. S. 539; *Mercantile National Bank* v. *New York,* 121 U. S. 138; *First National Bank of Gulfport* v. *Adams,* 258 U. S. 362; *Des Moines National Bank* v. *Fairweather,* 263 U. S. 103.

From the foregoing authorities, it would seem to inevitably follow that a copy of any such report, when properly identified, or when admitted to be a true copy as was done in the case at bar, is entitled to all the weight which the law gives to official reports and records made and kept in the performance of official duties.

The petition asserts (page 37) that the basis of the action of the trial court in admitting the reports was Sections 661 and 663, Title 28, U. S. C. A. As a matter of fact, the trial judge did not state that he relied upon those two sections, although Tway's counsel did argue that those sections, in connection with Sections 1636 and 1637 of Kentucky Statutes, as those two sections have been construed by the Court of Appeals of Kentucky, constituted sufficient authority for their admission. The court permitted the introduction of the evidence under the general rule applicable to the admission of public records and reports as evidence of the facts therein dealt with. That rule is thus stated in *American Jurisprudence,* Volume 20, page 861, Section 1023:

> "It is a well-recognized general rule that official records and written reports of a public nature

> which public officers are required, either by statute or by the nature of the duties of their office, to keep of transactions occurring in the course of their public service, made either by the officers themselves or under their supervision, are ordinarily admissible in evidence as proof of the facts recorded therein, so far as they are relevant and material to the particular inquiry, although the entries have not been testified to by the persons who actually made them and although they have, therefore, not been offered for cross-examination."

The rule is applicable not only to records kept and entries made in a public office, but to reports made by a public officer of an investigation of matters which the law makes it his duty to investigate and report. The same section of the same work states:

> "Records and reports of public officers made in the course of the discharge of their official duties are admissible not only as proof of the facts stated therein, but also to show the absence of entries that in the usual course should appear therein and to prove, by reason of the absence of any entry, that an event did not take place or that something was not done."

Wigmore on Evidence, Volume 5, page 672, Section 1670, in discussing the probative effect of the report of an investigation made by an official in the discharge of his duties, states:

> "A report is to be distinguished from a return, as already defined (*ante*, Sec. 1664), in that the latter is typically concerned with something done

> or observed personally by the officer, while the former embodies the results of his investigation of a matter not originally occurring within his personal knowledge. The older term customarily applied to the former type of statement—'inquisition' or 'inquest'—suggests more clearly its special quality, namely, that of resting upon means of information other than original personal observation.
>
> "Now an inquisition or report, if made under due authority, stands upon no less favorable a footing than other official statements. As a statement made under official authority or duty, it is admissible under the general principle."

In the petition, and throughout the course of this litigation, counsel for the Receiver has had much to say about the incompetency of that portion of a public official's report which is based upon information gathered from others, rather than upon his own observation and knowledge. But *Wigmore on Evidence,* Volume 5, pages 525 *et seq.,* Section 1635, punctures that contention. After stating that the *general* rule in respect of the competency of official records and reports excludes statements therein contained not based upon the personal knowledge or observation of the officer, the author points out that, where the law specifically requires or authorizes the official to ascertain the facts in whole or in part by an investigation or inquisition, his report of the facts obtained by such investigation or inquisition is competent under an exception to the general rule. The author states:

> "Now there may be cases in which the officer's duty clearly does involve his ascertainment of facts occurring out of his presence and requiring his resort to sources of information other than his own senses of observation; for example, an assessor's record of the value of real estate and of its occupancy, or a registrar of voters' record of electors' residences. When such a duty clearly exists, the general doctrine above, that a witness should have personal knowledge, need not stand in the way, for (as already noted) it has its conceded limitations; and where the officer is vested with a duty to ascertain for himself by proper investigation, this duty should be sufficient to override the general principle. It is true that due caution should be observed before reaching the conclusion that the law has in fact in a given case intended to invest the officers with such an unusual duty. But when it clearly appears that a duty has been prescribed to investigate and to record or certify facts ascertained other than by personal observation, then it follows that, in accordance with the general principle of the present exception, the statement thus made becomes admissible."

Of course, there can be no doubt that the law not only authorizes, but actually commands, national bank examiners to conduct such investigations or inquisitions, and report the facts so ascertained. The argument that public records and reports are competent evidence only of those facts therein reported as are within the personal knowledge and observation of the officer making such records and reports ignores the basis upon which public records and reports made and

kept in discharge of official duties are admitted as evidence of the facts therein stated. The reason for their admission is thus stated in *American Jurisprudence,* Volume 20, page 862, Section 1023:

> "Records of public officers are usually made by persons having no motive to suppress or distort the truth or to manufacture evidence, and, moreover, are made in the discharge of a public duty, and almost always under the sanction of an official oath. They form a well-established exception to the rule excluding hearsay. The exception rests in part on the presumption that a public officer charged with a particular duty has performed it properly. This is deemed sufficient to dispense with the necessity of oath and cross-examination. Since the records concern public affairs, and do not affect the private interests of the officers, they are not tainted by the suspicion of private advantage."

Gaines v. *Relf,* 12 How. 472, 570, states the reason in this language:

> "Such writings are admissible in evidence on account of their public nature, though their authenticity be not confirmed by the usual tests of truth; namely, the swearing and the cross-examination of the persons who prepared them. They are entitled to this extraordinary degree of confidence, partly because they are required by law to be kept, partly because their contents are of public interest and notoriety, but principally because they are made under the sanction of an oath of office, or at least under that of official duty, by accredited agents appointed for that purpose."

In *Chesapeake & Delaware Canal Co.* v. *United States,* 250 U. S. 123, 128, it is stated:

> "They were public records, kept pursuant to constitutional and statutory requirement. * * * Thus, their character as public records required by law to be kept, the official character of their contents entered under the sanction of public duty, the obvious necessity for regular contemporaneous entries in them and the reduction to a minimum of motive on the part of public officials and employees to either make false entries or to omit proper ones, all unite to make these books admissible as unusually trustworthy sources of evidence."

Wigmore on Evidence, Volume 5, page 514, Section 1632, in commenting on the adequacy of the reason for the rule, has this to say:

> "Nor is the adequacy of this traditional principle to be today discredited or doubted. Official honor may or may not be what it has been or what it ought to be, and it may differ in different communities and persons. But, in the matters with which the law of Evidence is concerned, official duty is on the whole a vital force, more potent than might be supposed, even in a community where official ceremony and dignity are as little regarded as with us. And even if the traditional assumption of the potency of official duty and honor be in some regions or for some classes of incumbents more a fiction than a fact, it is at least a fiction which we can hardly afford in our law openly to repudiate."

In view of the reason underlying the rule, what difference can it possibly make whether the facts recorded in the report reflect the officer's own observations or were ascertained by him as the result of inquiry and investigation? It will not be presumed that a public officer will do his duty and faithfully and truly record what he personally knows and observes, but will not faithfully and truly record what he has ascertained by an investigation which the law has commanded him to make.

In *Grant Bros. Construction Co.* v. *United States,* 232 U. S. 647, it was held that the report of a special board of inquiry appointed by an immigration inspector to inquire into whether certain persons were alien contract laborers, was competent evidence on that question in a penal action to recover the statutory penalties for having illegally imported contract labor into the United States. Of course, such a report was based upon an inquisition which developed facts of which the members of the board had no personal knowledge.

It has been held that certified copies of United States census reports are competent evidence of the age of a person, notwithstanding the obvious fact that the census enumerator is compelled to rely in most cases upon the word of others as to matters of age, name, etc. *Priddy* v. *Boice* (Mo.), 99 S. W. 1055. To the same effect see *Levels* v. *St. Louis & H. R. Co.,* 196 Mo. 622; *Stoddard* v. *Williams,* 64 Cal. 91; *Flora* v. *Anderson,* 75 Fed. 217, 231.

The petition (page 10) is especially critical of the admission in evidence of that part of the report of the examination of May-June, 1929, to the effect that in order to induce the examiner to postpone his demand for heavy charge-offs of slow, doubtful and worthless paper, the bank and its officers represented to him that a plan was in contemplation for the organization of a holding company which would take out of the bank the criticized assets, and also that a plan was on foot to denationalize the bank. We assume it will not be denied that a national bank examiner, under his broad powers and duties under Section 481, Title 12, U. S. C. A., heretofore quoted, has the right, and it is his duty, upon examination of a national bank to recommend that doubtful, slow and worthless assets should be charged off to the end that the financial statements of the institution will reflect its true condition. If the bank and its officials should refuse to accept such a recommendation, it would undoubtedly be the duty of the examiner to report the facts to his superior. Now, if it is his duty to report a refusal on the part of the bank's officials to make a charge-off when recommended by him, why isn't it his duty also, if his report shows doubtful, slow and worthless assets, to report to his superior why he failed to demand that they be charged off? That was exactly the situation dealt with in the examiner's report of May-June, 1929. His report showed a large amount of doubtful, slow and worthless assets. It showed that he had recommended a charge-off and that same was not made. He then proceeded, as unquestionably was his duty to do, to

explain and justify to the Comptroller why he agreed to postpone the enforcement of his demand for charge-offs. Furthermore, the promise of the officials of the bank reported by the examiner to his superior was damning proof of the condition of the bank. It displayed a willingness on the part of the officials not only to organize another corporation and use its funds to take criticized assets out of the bank, but to also denationalize, rather than to submit to a charge-off which would have materially impaired the surplus of the bank.

In addition to the reports being admissible in their entirety under the general rule applicable to official records and reports, we invite attention to Sections 661 and 663, Title 28, U. S. C. A.:

Section 661—

"Copies of any books, records, papers or documents in any of the executive departments authenticated under the seals of such departments, respectively, shall be admitted in evidence equally with the originals thereof."

Section 663—

"Every certificate, assignment, and conveyance executed by the Comptroller of the Currency, in pursuance of law, and sealed with his seal of office, shall be received in evidence in all places and courts; and all copies of papers in his office, certified by him and authenticated by the said seal, shall in all cases be evidence equally with the originals. An impression of such seal directly on the paper shall be as valid as if made on wax or wafer."

Of course, we appreciate that these statutes are susceptible of the construction that they authorize the use of authenticated copies in evidence only to the same extent that the originals thereof may be used, and do not authorize their use as evidence of the facts therein stated. However, there is ample statutory authority for the admission of these reports as evidence of the facts therein stated independently of the two sections of the Federal Statutes therein quoted. Sections 1636 and 1637 of Kentucky Statutes read as follows:

Section 1636—

> "All records and exemplifications of office books kept in any public office of the United States, or of a sister state, not appertaining to a court, *shall be evidence* in this state if attested by the keeper of such record or books, and the seal of his office, if there be a seal." (Emphasis ours.)

Section 1637—

> "Exemplifications from the books of the executive department of the United States, or any papers filed therein, *shall be evidence* when attested by the president or the chief of either of the departments; or from any state or territory, of like books or papers when attested by the governor or the secretary of state thereof, under his official seal." (Emphasis ours.)

Rule 43 of the Federal Rules of Civil Procedure, in substance, provides that all evidence which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States in equity proceedings, or which is

admissible under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States Court is held, shall be admitted, and that:

> "In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made."

The Court of Appeals of Kentucky has decided that under those two sections of Kentucky Statutes, records of an office of the Executive Department of the United States Government are competent evidence of the facts and matters therein stated. *Huffman* v. *National Surety Co.,* 244 Ky. 714, 51 S. W. 2d 950; *Anderson* v. *Commonwealth,* 143 Ky. 87, 136 S. W. 134. It would seem, therefore, that, independently of the general rule applicable to the admissibility of the reports of public officers made in the discharge of their statutory duties, Rule 43 of the Federal Rules of Civil Procedure required the admission of the reports under Sections 1636 and 1637 of Kentucky Statutes as construed by the Court of Appeals of that state.

The petition complains that many of the matters dealt with in the reports were hearsay in that the examiner was merely reporting what the bank officials told him, and that those matters could have been competently proven only by the testimony of the examiner. This contention appears ridiculous to us. If the matters as recorded in the reports are to be condemned as hearsay, wouldn't the same objection be available

against the oral testimony in court of the examiner concerning the same matters? Of course, they were not hearsay, coming second-hand to the examiner; but were direct statements from the bank's officials to the examiner, and the report of them was within the scope of, and a part of, the examiner's statutory duties, and admissible without further proof under the general rule heretofore referred to.

2.

The Admission in Evidence of Certain Paragraphs of the Receiver's Bill Against the Bank's Directors (Anderson, Receiver, v. Atherton, Et Al.).

The Receiver argues (Petition, pp. 43, 44) that this evidence was not competent as an admission against interest; and if it was, the court committed error in refusing to permit him to put in evidence the final opinion and decree in that case holding that some of the allegations were not sustained by the proof. *A sufficient answer to the latter part of the contention is that it was not finally judicially determined that any of the paragraphs of the bill which were read to the jury were not sustained by the evidence.* Pages 701 to 723 of the Record discloses the paragraphs of the bill which were read to the jury and we state categorically that it was not judicially determined in that case that the allegations contained in those paragraphs had not been established by proof. See *Atherton, et al.,* v. *Anderson, Receiver,* 99 Fed. 2d 883. The mistake that the Receiver makes is that he has gone on the assumption

that all the paragraphs of the bill were read to the jury, which is far from true.

Now, as to the admissibility of the paragraphs which were read to the jury.

Whatever may have been the ancient rule as to the right of a party to introduce in evidence as an admission allegations contained in an unverified bill of complaint in some other action, it is now well settled that such allegations are competent as admissions, if it is shown that by his conduct the party in whose behalf the unverified bill of complaint or petition was filed adopted such allegations as his own. Under the modern rule verification is important only as showing that the party sought to be charged with such allegations had knowledge of same. In the absence of verification knowledge may be established by other evidence. For instance, if it is shown that during the progress of the trial the party sought to be charged with knowledge of the allegations, relied upon and urged same, he is presumed to have adopted the allegations as his own. *American Jurisprudence,* Volume 20, page 536, Section 634, states the rule in this language:

> "The failure to verify a pleading may be material in respect of the admissibility of the pleading in behalf of the pleader, but the sound rule appears to be that the verification of a pleading is not a prerequisite in all cases to the admission in evidence against the pleader of a statement therein. Many of the decisions which hold that admissions in unverified pleadings are not admissible either in the case in which filed or in other cases may be explained upon the ground that the state-

ments in the pleading were regarded as the statements of counsel rather than the statements of the party. Formerly, pleadings were so involved and technical that the mere fact that a pleading was filed in behalf of a party was not sufficient to warrant an assumption that the statements therein were his statements. Consequently, verification was considered essential to the admission of statements in a pleading against the pleader, the theory being that a pleader was not charged with knowledge of the contents of his pleading unless he had verified it. The modern view appears to consider the verification of a pleading as only one method of charging the pleader with the contents of his pleading; accordingly, the statements in a pleading are not rendered inadmissible against the pleader by the fact that he did not verify the pleading or that there was an irregularity in his verification, if it appears that he authorized the allegations, signed the pleading, or otherwise approved the allegations thereof after it was drawn."

In *Rockland* v. *Farnsworth,* 89 Me. 481, 36 Atl. 989, it is stated:

> "The doctrine seems to be settled that pleadings in another suit may be used as admissions of the party, where they bear upon the material issues on trial and appear to have been made by his direction or adoption, shown by prosecuting the action upon them, as the foundation of his claim."

In *Wilkens* v. *Clawson* (Texas), 110 S. W. 103, we find this statement:

"Statements in pleadings are admissible in evidence against the party filing such pleading, without regard to whether the pleading is sworn to. It is always competent for the party against whom the pleading is offered to show that the statement was inadvertently made, or was not authorized by him, or made under a mistake of fact. Such explanation may weaken or destroy the force of the statement in the pleading, but that is a question for the jury, and affects the weight, not the admissibility, of the pleading as evidence."

To the same effect see:

Lamar v. Pearre, 90 Ga. 377, 17 S. E. 92;
Every v. Rains, 84 Kan. 560, 115 Pac. 114;
Ayres v. Hartford Fire Ins. Co., 17 Ia. 176;
McTyer v. Stearns, 142 Ga. 850, 83 S. E. 955;
Schmisseur v. Beatrie, 147 Ill. 210, 35 N. E. 525;
Coward v. Clanton, 94 Cal. 23, 21 Pac. 359;
Nicholson v. Snyder, 97 Md. 415, 55 Atl. 484;
Brown v. Jewett, 120 Mass. 215;
Bliss v. Nichols, 12 Allen (Mass.) 443;
Dowzelot v. Rawlings, 58 Mo. 75;
Kunglig Jarnvagsstyrelsen v. Dexter & Carpenter, 32 Fed. 2d 195 (2d Cir.);
Carpenter v. Tri-State Telephone & Telegraph Co. (Minn.), 211 N. W. 463;
First Nat'l Bank v. Wisdom's Exr., 111 Ky. 135, 63 S. W. 641.

The pleading containing the admission is admissible against the pleader even though offered in behalf of a stranger to the action in which the pleading was filed.

Pope v. Allis, 115 U. S. 363;
General Electric Co. v. Clark & Sons, 108 Fed. 170;
Schmisseur v. Beatrie, 147 Ill. 210, 35 N. E. 525;
Ring v. Gray, 6 B. Mon. 368;
Swift & Co. v. Dawson Papershell Pecan Co. (Ga.), 101 S. E. 754;
Harris v. Amoskeg Lumber Co., 101 Ga. 641, 29 S. E. 302;
Lamar v. Pearre, 90 Ga. 377, 17 S. E. 92;
Humphrey v. Monida Stage Co. (Minn.), 131 N. W. 498;
Bergman v. Solomon, 143 Ky. 581, 136 S. W. 1010.

The statement in the petition (pp. 26, 27) that the Court of Appeals of Kentucky, in *Rankin* v. *Maxwell*, 9 Ky. 488, had condemned the admission in evidence of an unverified bill in equity is true so far as it goes; but that case was decided in 1820, in the days of involved and technical chancery pleadings, and simply followed the generally accepted rule at that time that such a pleading, nothing else appearing, could not be regarded as a statement by the litigant himself. With the simplification of pleadings in Kentucky, there ceased to be any reason for the rule, and it is now the settled rule in that state that a litigant may introduce the allegations of his adversary in some prior suit, though not between the same parties, as an admission against interest. *First National Bank of Paducah* v. *Wisdom's Ex'r*, 111 Ky. 135, 63 S. W. 641; *Bergman* v. *Solomon*, 143 Ky. 581, 136 S. W. 1010.

The Receiver has never repudiated any of the allegations of the bill which were read to the jury, nor

does he claim that they were made without his knowledge or approval. On the contrary, they formed the basis of all of his claims in the directors suit and, measured by the rule laid down in the foregoing authorities, those allegations were competent as admissions against him in the case at bar. The trial court did not deny, or even intimate an intention to deny, the right of the Receiver to controvert any or all of them. The fact about the matter is that the Receiver had no desire even to attempt to controvert them. He knew he could not do so. He is simply seeking on specious grounds to secure a new trial in a case which he lost on the strength of his own records which he had effectively used in other cases against his adversaries, including Tway.

The complaint of the Receiver about the admission in evidence of the paragraphs from the bill appears all the more trivial and insincere when we learn from the record that he, himself, introduced a copy of the Courier-Journal of March 31, 1939, containing a complete copy of the bill, and his counsel questioned Tway in respect of the allegations thereof (R. 419-433). Later on, counsel for the Receiver, when questioned by the Court, admitted that he had placed the bill in evidence (R 621). This was before Tway's counsel had read any part of the bill to the jury, which was done at the conclusion of Tway's case in chief (R. 701).

3.

The Admission in Evidence of a Table Comparing the Net Earnings of the Bank With Dividends Paid, Prepared by an Accountant Employed by the Receiver and Used by the Receiver Against Tway in Another Suit.

The statement, the admission of which was complained of, was defendant's Exhibit No. 61 (R. 567), which showed that the bank was frequently paying dividends in excess of its current earnings. The trial court admitted only that part of the statement covering the period from June 20, 1927, to and including September 30, 1929, the latter date being only one day before Tway purchased the stock and executed his note for the purchase price. This statement had been prepared from the books of the bank in the possession of the Receiver by an accountant employed by him for that purpose, and had been introduced by the Receiver in the *Abbott* case as a correct summary made by his own employee of the information contained in the Receiver's own records.

We feel that it is unnecessary to say anything further in demonstration of the lack of merit in this contention of the Receiver.

4.

Refusal to Grant a New Trial on Alleged Newly Discovered Evidence.

We believe a recitation of the facts in respect of this contention of the Receiver will demonstrate its lack of good faith. After the jury returned a verdict in favor of Tway, counsel for the Receiver, among other motions, filed one for a new trial on the ground of newly discovered evidence. This motion was based upon the affidavit of one of counsel for Receiver and on the affidavit of the assistant to the Receiver that the case had been tried by the Receiver under the impression that Tway had purchased the stock for his own account; that after the trial the Receiver and his counsel, for the first time, discovered that Tway had not bought the stock for his own account, but for the account of R. C. Tway Coal Sales Company, a corporation substantially all of whose stock was owned by Mr. Tway; that, therefore, the fraud, if any, had not been committed against Tway, but against the corporation, and that as Tway, individually, had sustained no damage as a result of such fraud, he could not plead fraud as a defense to the suit on his note (R. 1234-1243).

When this motion was argued before the trial judge Tway's counsel showed by the authorities that, even though Tway had bought the stock for the account of an undisclosed principal (which in fact he did), nevertheless, when sued on the note all the defenses were available to him which would have been available to

his principal, had the principal itself bought the stock and executed the note, and had the suit been against the principal alone. Thereupon, counsel for the Receiver, in the middle of the hearing, immediately shifted their position and claimed that the newly discovered evidence would show that Tway had bought the stock for himself and thereafter had sold it without loss to the company, and hence could not plead fraud when sued on the note (R. 1252, 1262-1297, 1298).

The Receiver claimed that it would be necessary to take the depositions of the defendant, Tway, and C. H. Clark, to develop the alleged facts (R. 1248). Tway's counsel agreed to make both Tway and Clark available for examination by counsel for the Receiver and to have the books and the records of the R. C. Tway Coal Sales Company present for examination and use in the interrogation of the witnesses. Counsel for the Receiver, on the day appointed, examined the books and records and then announced that they did not desire to take the deposition of either Tway or Clark, both of whom were present, and ready to submit to examination (R. 1232-1264).

The facts as to who was the real purchaser of the stock were developed before the lower court by affidavits appearing at pages 1266 to 1296 of the record, and the memorandum of the court denying the motion for a new trial on the ground of newly discovered evidence, either as at first advanced or as later urged, is set out in full at pages 1296 to 1299 of the record, the Court concluding that the evidence relied upon by the Receiver to establish that Tway originally bought the

stock for himself was so trivial as not to justify submitting the question to the jury, even if it was of any materiality. On that point the Court said (R. 1298):

> "As I view the evidence submitted on this question, which is in the form of affidavits and excerpts from the material corporate records, it is not reasonable to believe that the jury would have, or that any other jury would find that the defendant was the first owner of the stock in his own right. All of the circumstances surrounding the transaction as of the dates involved, which are in the record, would negative the idea that the defendant was so acting. The circumstances would clearly exclude any motive for a transfer under such circumstances. It would be futile to retry the case simply to submit to the jury this question of fact with so little to support the plaintiff's contention and so much to support the defendant's contention."

Of course, the question of whether Tway bought the stock for his own account or for an undisclosed principal was wholly immaterial. The note sued on was a negotiable instrument and it is a well-settled principle of law that an undisclosed principal cannot be sued on such an instrument executed and signed only by his agent, but that the agent alone can be sued and, when so sued, all the defenses are available to him as would have been available to the principal had he executed the note and been sued thereon. *American Jurisprudence,* Volume 2, page 312, §397, states the rule:

> "There is, *in the case of negotiable instruments* a generally recognized exception to the general rule that an undisclosed principal may, when discovered, be sued upon contracts made by his agent. It may be stated as a general rule that an undisclosed principal can not be held liable upon a *negotiable instrument signed or endorsed by his agent alone,* as each party taking a negotiable instrument contracts with the parties who upon the face of the instrument are bound for its payment." (Emphasis ours.)

The Kentucky Negotiable Instruments Law, Kentucky Revised Statutes, §356.018, Carroll's Kentucky Statutes, §3720b-18, which, of course, is controlling in this case, provides:

> "No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise provided. But one who signs in a trade or assumed name will be liable to the same extent as if he had signed in his own name."

The statute contains no applicable exception. Rule 17(b) of the Federal Rules of Civil Procedure in part provides:

> "The capacity of an individual other than one acting in a representative capacity to sue or be sued shall be determined by the law of his domicile."

This rule is but supplementary to the Conformity Act (§725, Title 28, U. S. C. A.).

It is perfectly apparent, therefore, that under the general law and under Kentucky Negotiable Instruments Law, had the petitioner known at the time he filed his suit what he claims to have discovered after the trial, nevertheless he could have sued no one on the note except Tway. The defenses available to Tway are thus stated in the *Restatement of the Law of Agency,* §334, at page 738:

> "In an action against an agent upon a contract between a third person and the principal to which the agent is a party, the agent has all the defenses which arise out of the transaction itself and those which he personally has against the third person; defenses which are personal to the principal are not available to the agent."

The comment which follows the above statement makes the meaning of the statement perfectly clear. It reads as follows:

> "Defenses to the action arising out of the transaction itself, such as fraud, misrepresentation, recoupment, breach of condition, nonperformance, and the like, as well as payment and accord and satisfaction, will be available to the agent together with defenses, such as infancy or set-off, which the agent himself may have against the third person. If a contract results from misrepresentations of the third person to the principal, an agent without notice of their untruth has the same defense as the principal would have in an action against him; if the agent colludes in deceiving the principal, the transaction is illegal and the contract is unenforceable by the third person against the agent.

> "On the other hand, defenses resulting from personal incapacities or immunities of the principal, as where the principal is an infant or has become bankrupt, are not open to the agent."

It is clear from the foregoing authorities that the question of the actual ownership of the Banco stock was a wholly immaterial one, and the Receiver is left finally to the ridiculous contention that this Court should grant certiorari because the trial court refused to give him an opportunity on a new trial to discredit all of Tway's testimony by showing that he had falsely sworn that he was personally the purchaser and owner of the Banco stock. Furthermore, from a reading of Tway's cross-examination (appearing in the record at pages 293 to 307), so much relied upon by the Receiver as evidence of a false statement on the part of Tway that he was the owner of the stock, it will be found that those answers of Tway were the climax of an attempt by counsel for the Receiver to show that before Banco's collapse Tway could have sold the stock at a profit. The questions sought to draw answers from Tway showing that he was in a position for himself (or for his Company) to make delivery of the stock to a purchaser, although when he pledged the stock to the bank on the note, he had attached to the stock the usual authority enabling the bank to sell same in case of default on the note. The questions were not directed to the point whether the stock was owned individually by Tway or his corporation, but rather to whether he knew the bank did not own it and to Tway's ability

to make sale and delivery thereof. We believe a careful reading of the cross-examination will satisfy any one that Tway was not wilfully trying to deceive counsel for the Receiver as to who owned the stock.

5.

Refusal to Submit to the Jury the Receiver's Defense of Ultra Vires.

The contention of the Receiver on this point is that the action of the bank in selling the stock to Tway was *ultra vires* and, inasmuch as Tway was the purchaser of that stock and charged with knowledge of the fact that the bank could not validly sell stock of Banco, he was, therefore, a participant in the *ultra vires* act of the bank and could not avail himself of the defense of fraud.

We have no quarrel with the rule that *ultra vires* contracts of corporations are unenforceable, but the fallacy in the Receiver's contention is that it wholly overlooks the fact that Tway is not trying to enforce any contract executed by the bank in excess of its powers. On the contrary, he is repudiating the entire transaction.

Federal and state courts alike, without exception, hold that corporations, including national banks, are answerable for every wrong they commit, and that in such cases the doctrine of *ultra vires* has no application. *National Bank* v. *Graham,* 100 U. S. 699, 702, states the universal rule:

"Corporations are liable for every wrong they commit, and in such cases the doctrine of *ultra vires* has no application.

"They are also liable for the acts of their servants while such servants are engaged in the business of their principal, in the same manner and to the same extent that individuals are liable under like circumstances. * * * An action may be maintained against a corporation for its malicious or negligent torts, however foreign they may be to the object of its creation or beyond its granted powers. It may be sued for assault and battery, for fraud and deceit, for false imprisonment, for malicious prosecution, for nuisance, and for libel."

See also *Salt Lake City* v. *Hollister,* 118 U. S. 256, 260; *National Bank* v. *Anderson,* 172 U. S. 573; *Gas Light Co.* v. *Lansden,* 172 U. S. 534, 544; *Greeley National Bank* v. *Wolf,* 4 Fed. 2d 67 (8th Cir.); *Wasmann* v. *City National Bank of Knoxville,* 52 Fed. 2d 705 (6th Cir.); *In re Kentucky Wagon Manufacturing Company,* 71 Fed. 2d 802, 804 (6th Cir.).

In every *ultra vires* act of a corporation dealing with another party, out of which such other party assumes some obligation, of course it can be said that such party was an actor or participant in the *ultra vires* act of the corporation, and the rule contended for by the Receiver would result in permitting the corporation to enforce such obligation, even though same was obtained by the grossest fraud on the part of the corporation or its agent.

Such cases as *Deitrick* v. *Greaney,* 309 U. S. 190, and *D'Oench, Duhme & Co.* v. *Federal Deposit Insur-*

ance Corporation, 315 U. S. 447, relied upon by the Receiver, have no application whatever. In *Deitrick* v. *Greaney,* a national bank had purchased and held in its assets, in violation of §83, Title 12, U. S. C. A., shares of its own capital stock. To enable it to own the stock without the national bank examiners discovering that fact, it entered into an arrangement with Greaney, a director, by which he made a pretended purchase of the stock, executing and delivering to the bank his note for the purchase price with the understanding that the stock should at all times continue the property of the bank and that he should never be required to pay the note. Upon failure of the bank, its receiver brought suit against Greaney on the note. Greaney's answer set up the illegal arrangement above referred to and relied specifically upon the bank's agreement that he would not be required to pay the note. It is perfectly apparent that in that case Greaney was trying to enforce a contract made by the bank in violation of law and necessarily *ultra vires.* There, of course, this Court held:

> "If respondent were free to set up the unlawful agreement as a defense and thus cast the loss from the unlawful stock purchase on the creditors of the bank in receivership, he would be enabled to defeat the purpose of the statute by taking advantage of an agreement which it condemns as unlawful. That we think the law does not allow."

Tway occupies no such position as did Greaney. He did not connive with the bank to commit a fraud upon creditors or to conceal a violation of the law. In-

stead of participating in the commission of a fraud, as was true of Greaney, Tway was the victim of fraud on the part of the bank. The case of *D'Oench, Duhme & Co.* v. *Federal Deposit Insurance Corporation* involved a substantially similar arrangement as was condemned in *Deitrick* v. *Greaney.*

6.

Refusal of the Trial Court to Hold That Tway Could Not Plead Fraud as a Complete Defense to the Note.

The contention of the Receiver is that in this action Tway's only remedy was to assert the fraud practiced upon him in a counterclaim for damages, offsetting any damages he may have recovered against judgment on the note. He has persistently refused to recognize the fact that Tway was not the plaintiff in this proceeding. Tway's position is that of one resisting the collection of an instrument claimed to have been procured through fraud. The applicable law is perfectly plain. *Williston on Contracts,* Volume 5, page 4269, Section 1525, states:

> "The alternative remedy of rescission and restitution is in its origin equitable, though now similar relief can generally be obtained at law. If the defrauded party has parted with nothing but has merely entered into an executory obligation by simple contract, it needs no citation of cases to establish the point that he may plead the fraud as a defense * * *.

> "If the defrauded party has parted with property which he wishes to regain, he is compelled to become an actor."

Corpus Juris Secundum, Volume 10, page 1091, Section 496, states the rule in this language:

> "As between the original parties to a bill or note, or as against one who is not a holder in due course for value, fraud in the consideration or in the procurement of the bill or note is ordinarily a defense."

In *American Jurisprudence,* Volume 8, page 292, Section 587, it is stated:

> "Fraud in the inception of an instrument is a defense against a holder unless he is protected as a holder in due course or by the operation of an estoppel."

The same work, Volume 24, page 28, Section 204, under the heading "Fraud as Defense," states:

> "Under the modern law, at least in most jurisdictions, fraud in the inducement or the factum of a transaction or contract, commercial or otherwise, may be established as a defense to a claim prosecuted by the person guilty of fraud. Hence when a fraudulent transaction is sought to be enforced in the courts, the defendant may set up the fraud as either a complete or a partial defense, as the case may be, or else in mitigation of damages, or as a ground for recoupment."

Page on Contracts, Volume 1, page 218, Section 136, states:

"If the contract is executory as to the liability of the defrauded party, he may avoid liability thereunder, and interpose the defense of fraud in an action brought against him on the contract at law. This is, in one sense, informal rescission since no decree in equity is necessary. It differs, however, from what is ordinarily termed informal rescission in that the injured party is not seeking to recover what he has parted with under the contract, but is seeking to avoid further liability thereunder."

6 *Ruling Case Law*, 637:

"Since a contract induced by fraud is voidable, the defrauded party may elect to rescind the contract upon the discovery of the fraud. The injured party may, moreover, resist the enforcement of the contract not only in a court of equity but in a court of law. The defense of fraud may be made when a third party, for whose benefit a contract was made, seeks to enforce it. The fact that the contract is in writing does not preclude the introduction of evidence to show that a material stipulation therein was founded on the misrepresentations and fraud of one of the parties. There is no rule of law precluding the defendant, in an action on a written contract, from pleading and proving fraudulent representations of the other party on which he has relied to his prejudice as inducement for the making of the contract sued on. This is the ordinary defense of fraud, which may be interposed in an action at law by way of defense to recovery on a written contract."

Prior to the enactment, in 1915, of Section 274(b) of the Judicial Code (Sec. 398, Title 28, U. S. C. A.), it was generally held by federal courts that the plea of fraud in the procurement of a written contract under seal or a contract in the nature of a specialty was not available to the defrauded party when sued thereon at common law, inasmuch as such a plea was an equitable one. *Burns* v. *Scott,* 117 U. S. 582; *Northern Pacific R. R. Co.* v. *Payne,* 119 U. S. 561; *George* v. *Tate,* 102 U. S. 564; *Whitcomb* v. *Shultz,* 223 Fed. 268 (2d Cir.). The usual remedy resorted to was to file a bill in equity to enjoin the further prosecution of the common law action on the written instrument, as was done in the case of *Salters* v. *Williams,* 244 Fed. 126 (3d Cir.). However, in an action at law in a federal court to enforce a simple contract, the defense of fraud in its procurement has always been available to the injured party. Section 274(b) of the Judicial Code in part provides:

> "In all actions at law equitable defenses may be interposed by answer, plea or replication without the necessity of filing a bill on the equity side of the court."

And that section of the Code has been carried into the new Federal Rules of Civil Procedure as Rule 8 (e) (2), which in part reads:

> "A party may also state as many separate claims or defenses as he has, regardless of consistency or whether based on legal or on equitable grounds or on both."

Enelow v. *N. Y. Life Ins. Co.*, 293 U. S. 379; *Adamos* v. *N. Y. Life Ins. Co.*, 293 U. S. 386; *Burroughs Adding Machine Co.* v. *Scandanavian American Bank*, 239 Fed. 179 (District Court of Washington); *Williams* v. *Green*, 23 Fed. 2d 796 (4th Cir.); *Neff & Fry Co.* v. *Ashmead*, 36 Fed. 2d 771 (2d Cir.); and *Seward* v. *South Florida Securities, Inc.*, 96 Fed. 2d 964 (5th Cir.), were each actions at law, and in each case it was held that the defense of fraud was available to the defendant.

Under Kentucky law, the defense of fraud in the procurement of a contract has always been available when the defrauded party is sued in an action at law on such contract. *Ross* v. *Braydon*, 2 Dana, 161; *Childers* v. *Billiter*, 144 Ky. 53, 137 S. W. 795; *Stephens* v. *Bailey*, 228 Ky. 436, 15 S. W. 2d 263; *Bernhard* v. *Commercial Security Co.*, 185 Ky. 357, 215 S. W. 84; *Kentucky Central Life & Accident Ins. Co.* v. *Edmonson*, 218 Ky. 825, 292 S. W. 511.

The rule laid down in those Kentucky cases would be controlling in this case even though Section 274(b) of the Judicial Code had never been enacted. As there is no controlling federal statute to the contrary, the Receiver, in enforcing the claims of the bank, may do so only in conformity to the law of the forum governing the recovery of debts of like nature. *Pufahl* v. *Estate of Parks*, 299 U. S. 217, 225; *Rawlings, Receiver*, v. *Ray*, 312 U. S. 96, 99.

The rule established by the foregoing authorities applies with equal force in suits brought by receivers of national banks, although counsel for the Receiver

strenuously contended to the contrary in the lower court. Federal courts have repeatedly declared that a receiver of a national bank takes over the assets of the bank as a trustee for creditors, and, in the absence of a statute to the contrary, subject to all the claims and defenses which might have been interposed against the bank when it was a going concern. The cases on this subject will be found collected under Note 41 of Section 192, Title 12, U. S. C. A.

In *Scott* v. *Armstrong,* 146 U. S. 499, this Court said:

> "The receiver took the assets of the Fidelity Bank as a mere trustee for creditors, and not for value and without notice, and, in the absence of statute to the contrary, subject to all claims and defenses that might have been interposed as against the insolvent corporation before the liens of the United States and of the general creditors attached."

As there is no federal statute denying the right to plead fraud as a defense in a suit by the receiver of a national bank on a note constituting a part of the assets of an insolvent bank, Tway was clearly within his rights in interposing such a plea.

The petition comments on the fact that Tway did not tender to the Receiver either the Banco stock or the $1,600 of dividends paid on same, as if such tender were a condition precedent to his right to plead fraud. The record shows that at the time Tway discovered the fraud practiced upon him, and at the time he filed his answer, the stock was worthless, and furthermore was

in the actual possession of the Receiver with full power to dispose of same. He had paid on the note a total of $10,883.33, $5,883.33 of that amount being interest and $5,000 payment on principal (R. 107).

Where the defrauded party has suffered by the fraud complained of a greater loss than the consideration which he retains, restoration is not required. *Williston on Contracts,* Volume 5, Sec. 1530; *Page Belting Co.* v. *F. H. Prince & Co.,* 77 N. H. 309, 91 Atl. 961; *Taylor* v. *Lounsbury-Soule Co.,* 137 Atl. 159 (Conn.).

The Alleged Inconsistency of Tway's Position in the Case at Bar With His Position in the Case of Anderson, Receiver, v. Abbott, Et Al.

The Receiver's brief (51) in support of his petition asserts that Tway's position in the case at bar is inconsistent with his position in the case of *Anderson, Receiver,* v. *Abbott, et al.* This contention is based upon what the Receiver contends are irreconcilable allegations in Tway's answers in the two cases. Paragraph XII of the bill of complaint in the Abbott case alleged in substance that BancoKentucky Company was organized by the bank and its stockholders for the purpose of enabling the stockholders of the newly organized institution to enjoy all the advantages and benefits of stockholders of a national bank without incurring the double liability to which national bank stockholders were liable under the national banking law. Strictly in answer to that paragraph, the answer of the defendants in that case in part stated (Abbott, R. 89):

"In regard to Paragraph XII, pages 6 and 7 of the Bill, defendant denies * * * that said BancoKentucky Company was organized as a holding company, or as the agency or the instrumentality for the use of enrichment or furtherance of a scheme to engage in unlawful acts to enable the trustees to unlawfully acquire any property whatsoever, or in defiance of the meaning, or spirit or intent of the laws of the United States or the Commonwealth of Kentucky, or any other state, relating to the ownership or operation or supervision of banks or trust companies. The defendant denies that the BancoKentucky Company was organized by any one as an agency or instrumentality, or for any other purpose, than as a bona fide corporation to conduct the business provided for in its Charter."

The purpose of the *Abbott* suit was to have Banco stockholders adjudged stockholders of the National Bank of Kentucky, and subject to stockholder double liability as such. In that suit the question of whether or not Tway was induced to become a stockholder of Banco by fraud practiced upon him by the bank was wholly immaterial, as it is well settled that when a stockholder of an insolvent national bank is sued by the receiver of that institution to collect an assessment made under the double liability statute, he cannot make the defense that he was induced by fraud to become a stockholder. *Scott* v. *DeWeese,* 181 U. S. 202; *Lantry* v. *Wallace,* 182 U. S. 536; *Whitney* v. *Butler,* 118 U. S. 655; *Robertson* v. *Conway,* 188 Fed. 579 (6th Cir.); *Anderson* v. *Cronkleton,* 32 Fed. 2d 170 (8th Cir.);

Ryan v. *Mt. Vernon National Bank,* 224 Fed. 429 (2d Cir.); *Page* v. *Jones,* 7 Fed. 2d 541 (8th Cir.); *Wilcox* v. *Harriman Securities Corp.,* 10 Fed. Supp. 535.

Furthermore, in the *Abbott* case, notwithstanding the allegations of the petition, the motives which prompted the organization of Banco were of no materiality whatever, and this Court so held. *Anderson, Receiver,* v. *Abbott, et al.,* 321 U. S. 349. At page 357 of the opinion in that case, this Court said:

> "Thus it is no bar to the present suit that Banco was organized in good faith, that there was no fraudulent intent, that Banco was not a sham, that it was not a mere holding company, or that the shareholders of the Bank had no purpose of avoiding double liability. We are not concerned with any question of good intention. The question is whether the parties did what they intended to do and whether what they did contravened the policy of the law."

Now, in the case at bar, it was alleged in Paragraph II of the answer (R. 21) that among the purposes which the bank had in mind in the organization of Banco was to have the newly organized company use its assets for taking sour assets which had been criticized by the Comptroller and the national bank examiners out of the National Bank of Kentucky, and the answer pleaded that this fact, as well as other material facts, were not disclosed to Tway at the time the bank sold the Banco stock to him. It is apparent, therefore, that this allegation was a material one in the case at bar.

It is settled law that allegations of fact made by a party in a pleading in a prior action, which are not necessary or pertinent to a correct decision of that case, do not preclude the party making such allegations from proving those facts in a subsequent action between the same parties when proof thereof is essential to a correct decision of the second case.

The fact that the Circuit Court of Appeals in the *Abbott* case found, as this Court stated:

> "that Banco was organized in good faith and was not a sham; that it was not organized for a fraudulent purpose or to conceal enterprises conducted for the benefit of the Bank;"

does not alter the situation. Such finding does not have the effect of an estoppel by judgment. For a judgment in a prior suit to be conclusive upon the same parties in a subsequent suit,

> "it must appear by the record of the prior suit that the particular matter sought to be concluded was necessarily tried or determined,—that is, that the verdict in the suit could not have been rendered without deciding that matter; or it must be shown by extrinsic evidence, consistent with the record, that the verdict and judgment necessarily involved the consideration and determination of the matter." *Russell* v. *Place,* 94 U. S. 606, 608.
>
> "In other words, to determine the effect of a former judgment pleaded as an estoppel, two questions must be answered: (1) Was the former judgment rendered on the same cause of action? (2) If not, was some matter litigated in the former suit determinative of the matter in controversy in the second suit? To answer these questions we

> must look to the pleadings making the issues, and examine the record to determine the questions essential to the decision of the former controversy." *United States Shoe Machinery Corp.* v. *United States,* 258 U. S. 451, 459.

See also, *Cromwell* v. *County of Sack,* 94 U. S. 351, 352.

It is submitted, therefore, that neither Tway's answer, nor the decision of the Court, in the *Abbott* case is conclusive against Tway to any extent in the case at bar.

The claim of inconsistency leveled against Tway comes with very poor grace from the Receiver whose position in the case at bar in respect of the probative effect and value of the national bank examiners' reports and other documents, and of the condition of the bank is diametrically opposed to his position in respect of those same matters in the *Abbott* case.

We commend to his consideration this language in the greatest sermon ever preached:

> "And why beholdest thou the mote that is in thy brother's eye, but considerest not the beam that is in thine own eye? * * *
>
> "Thou hypocrite, first cast out the beam out of thine own eye; and then shalt thou see clearly to cast out the mote out of thy brother's eye."

Respectfully submitted,

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